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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, AS PRESIDENT OF THE YONKERS COMMITTEE FOR PEACE, AN UNINCORPORATED ASSOCIATION, PETITIONER,

vs.

WILLIAM DIXON, ET AL., AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF YONKERS, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION

PETITION FOR CERTIORARI FILED JANUARY 14, 1954

CERTIORARI GRANTED MARCH 15, 1954

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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

COUNTY OF WESTCHESTER

—o—

In the Matter
of
The Application of JAMES R. ELLIS, as President of the YONKERS COMMITTEE FOR PEACE, an unincorporated association,
Appellant,
against
WILLIAM DIXON, JR., *et al.*, as members of the Board of Education of the City of Yonkers, etc.,
Respondents.

—o—

Notice of Appeal.

Sir:

PLEASE TAKE NOTICE, that the appellant above-named, does hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, from the order entered in the Office of the Clerk of the County of Westchester, on the 28th day of January, 1953, which denied the above-entitled application and from each and every part of said order.

Dated: New York, N. Y., January 30, 1953.

EMANUEL REDFIELD,
Attorney for Appellant,
60 Wall Street,
New York 5, N. Y.

Notice of Appeal.

4 To:

Clerk of the County of Westchester,

J. Raymond Hannon, Esq.,
Corporation Counsel,
Attorney for Respondents,
City Hall,
Yonkers, New York.

5

6

Order Appealed From.

At a Special Term, Part I of the Supreme Court, held in and for the County of Westchester, at the County Court House in the City of White Plains, N. Y., on the 22nd day of January, 1953. 7

Present: Hon. Frank H. Coyne,

Justice.

—o—

In the Matter
of
The Application of JAMES R. ELLIS, as President of the YONKERS COMMITTEE FOR PEACE, an unincorporated association, 8

against

WILLIAM DIXON, JR., JOHN N. DILL, ABRAHAM H. ELKIND, WALTER J. GALLAGHER, ROBERT H. HUSTON, WILLIAM F. LALLY, VIRGINIO MINERVINI, JAMES G. PARK and WILLIAM W. SCHWARTZ, as members and trustees of the Board of Education of the City of Yonkers, for an order pursuant to Article 78 of C. P. A. directing the said Board to permit the said unincorporated association the use of a schoolhouse in Yonkers pursuant to Section 414 of the Education Law, 9

Respondents.

—o—

The above named petitioner having moved this Court by a Notice of Motion dated December 9, 1952, for an order, pursuant to Article 78 of the Civil Practice Act, directing the Respondents to permit it to use a schoolhouse in the City of Yonkers, and the Respondents having, pursuant to Section 1293 of the Civil Practice Act, duly served

notice that an application would be made upon the return day of said proceeding for an order dismissing the said petition because of objections in point of law, which notice was dated December 16, 1952, and the matter having come on for argument before this Court on the 19th day of December, 1952, and Emanuel Redfield, Esq., attorney for Petitioner, having been heard in support of motion and J. Raymond Hannon, Esq., Corporation Counsel of the City of Yonkers and attorney for the Respondents, having been heard in opposition thereto,

On reading and filing the petition, verified the 19th day of December, 1952, the notice of motion, dated December 9, 1952, and the notice of motion to dismiss the petition, dated December 16, 1952, and due deliberation having been had thereon.

Now, on motion of J. Raymond Hannon, Corporation Counsel of the City of Yonkers and attorney for the Respondents, it is

Ordered that the petitioner's application be and the same hereby is in all respects denied, and it is further

Ordered that Respondents' cross motion to dismiss the petition be and the same hereby is in all respects granted.

Enter,

FRANK H. COYNE,
J. S. C.

Notice of Motion.

(Same Title.)

Sir:

PLEASE TAKE NOTICE, that upon the annexed petition of James R. Ellis, sworn to the 9th day of December, 1952, the undersigned will move this Court at a Special Term, Part One of this Court at 166 Main Street, White Plains, New York, on the 19th day of December, 1952, at 10:00 A. M. or as soon thereafter as counsel can be heard for an order directing the respondents to permit the petitioner's organization the use of a school house in Yonkers, New York, at a time and place to be fixed in the order pursuant to Section 414 of the Education Law and for such other and additional relief as to the Court may seem just.

Dated: December 9, 1952.

Yours, etc.,

EMANUEL REDFIELD,
Attorney for Petitioner,
60 Wall Street,
New York 5, N. Y.

Petition.

(Same Title.)

To the Supreme Court of the State of New York:

The petition of James R. Ellis, respectfully shows this Court:

Petition.

16 1. That petitioner is the President of the Yonkers Committee for Peace, an unincorporated association.

2. That said unincorporated association was formed among residents and citizens of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war. The objects of this group can best be stated from the statement of purposes of the organization which was drafted at the time it was organized:

17 "We have a choice between life in peace, or death by war. There is no third choice. In the event of an atomic war, the front line will not be thousands of miles away but right at our front doors. You may be a victim.

We realize that there are differing views on the causes and solutions of the world's troubles, but we firmly believe that war is not the cure for any of them. Winter, Spring, Summer and Fall are inevitable. We believe that war is not. War is man-made and can

18 be undone by man.

This is our aim; this is our cause * * * STOP WAR. Here is how we think it can be done.

1. As Americans we have the privilege of letting our representatives in Washington know how we feel about any matter. The price of a post-card is the cost to you. It's a very good investment.
2. We also have the right to let the press and radio know of our feelings toward any of

their propaganda drives. Right now they are drumming for war. Let them know how you feel about it.

3. It is our privilege and our duty to hear both sides of every issue before making a decision. Your daily press is one side of this war issue. Any of numerous peace groups in every section of our land can give you the other side.

4. Taxes are collected by the government to improve the welfare of the American people. For our tax money we can have armed camps throughout the entire world, or better schools, better homes and lower living costs. Which do you want? Let your Congressman know, your friends and everyone you come in contact with. This is our birthright, and to fear open discussion is more un-American than any difference of opinion amongst us could possibly be.

This country of the people, by the people, and for the people shall indeed remain free if we all exercise our rights as citizens."

3. That at all times hereinafter mentioned the respondents, William Dixon, Jr., John N. Dill, Abraham H. Elkind, Walter J. Gallagher, Robert H. Huston, William F. Lally, Virginio Minervini, James G. Park and William W. Schwartz, were and still are members and trustees of the Board of Education of the City of Yonkers.

4. Petitioner at all times hereinafter mentioned was and still is a citizen of the United States and a resident of Yonkers, New York.

22 Petitioner's occupation is that of being engaged in the carpet and rug cleaning business.

5. That on May 14, 1952, petitioner applied to the respondents duly executed on its form for that purpose for permission to use the auditorium of Saunders Trade School or any other school for the purpose of a forum for the discussion of peace and war.

6. Under date of May 28, 1952, the respondents replied:

23 "Your application of May 14, 1952, for permission to use the auditorium of the Saunders Trade School or any other school has not been approved, and I sincerely regret that I am unable to grant the desired permission. Yours very truly, George Scheele, Jr., Secretary."

7. On June 23, 1952, petitioner wrote to the respondents as follows, asking for the reason for the refusal:

24 "This is in answer to your letter of May 28th. This Committee is surprised and disappointed that the Board of Education of Yonkers has not seen fit to approve our application of May 14th, for the use of the auditorium of the Saunders Trade School, or any other school for a lecture and forum.

"By vote of our committee, I have been instructed to inquire of the Board of Education, the reason or reasons for refusing to approve the request of this committee.

"Will you please let me know at your earliest convenience, why the request was turned down. 25

Yours very truly,

YONKERS COMMITTEE FOR PEACE,
JAMES R. ELLIS, Chairman."

8. To this letter, respondents replied as follows:

"Your letter of June 23, 1952, inquiring as to the reason or reasons for the refusal of the Board of Education to grant your request 26 for the use of the Saunders Trade School, has been received and will be presented to the Board of Education at its next regular meeting scheduled to be held on July 10, 1952. Yours very truly, George Scheele, Jr., Secretary."

9. Thereafter on July 11, 1952, the respondents replied that the matter was referred to the Superintendent of Schools:

"Your letter of June 23, 1952, was presented to the Board of Education at its meeting held on July 10, 1952, and was referred to the Superintendent of Schools. Yours very truly, George Scheele, Jr., Secretary." 27

10. Thereafter on August 14, 1952, the Superintendent of Schools replied that the application was denied, without comment, as follows:

"The Board of Education has referred to me your communication for reply. The request of your Committee was presented to the Board of Education, which group has the

28 sole authority to grant permission for the use of schools. The application was denied by the Board of Education without comment. Very truly yours, Stanley S. Wynstra, Superintendent of Schools."

11. On October 31, 1952, petitioner again applied and duly executed a form supplied therefore by respondents for the use of the auditorium of Public School No. 13 in Yonkers, New York, for December 3, 1952, or December 5, 1952.

29 12. On November 7, 1952, your petitioner received a communication from respondents denying the use, without explanation, as follows:

"Your application of October 31, 1952, for use of the auditorium of Public School No. 13, was presented to the Board of Education at a meeting held November 6, 1952. The Board of Education did not approve said application and I, therefore, regret that I am unable to grant the desired permission. Yours very truly, George Scheele, Jr., Secretary."

30

13. On November 13, 1952, petitioner appeared before a public meeting of the respondents at which meeting petitioner protested the aforesaid refusal, but respondents failed and still refuse to grant permission for the use of the schoolhouse to said Yonkers Committee for Peace.

14. That pursuant to Section 414 of the Education Law of the State of New York, the respondents, and/or their predecessors, as members of the Board of Education of the City of Yonkers, adopted regulations for the use of the school-

houses, grounds or other property when not in use for school purposes in Yonkers, New York, whereby organizations at all times herein mentioned were and are permitted the use of the school buildings when not in use.

15. That at all times herein mentioned and at all times since the adoption of the aforesaid regulations, the school buildings, grounds and property of and in the City of Yonkers have on numerous occasions (whose number are best known to respondents and at such numerous times and occasions that the practice is an accepted practice) been permitted to be used pursuant to Section 414 of the Education Law by organizations for the purpose of public assembly and discussion.

16. That at no time herein mentioned did the respondents inform petitioner of the reason for the denial of his application, nor did they ask petitioner or his organization to fulfill any further requirements or conditions for permission to use by them of a school building in Yonkers, New York, for purposes of public assembly or discussion.

17. That by reason of the action of the respondents in failing to give a reason for its action whereas permission is freely granted to others applying, it is evident that the respondents are concealing a design to discriminate against petitioner and his said organization, for which discrimination there is no foundation in law or fact, and that the acts of respondents are arbitrary and unreasonable.

18. The action of respondents violates the
34 right of petitioner and the constituent members of his organiza ion of freedom of speech and assembly guaranteed by the Constitution of the United States and denies them the equal protection of the laws in violation of the Constitution of the United States.

WHEREFORE, petitioner prays that this Court grant an order requiring respondents to grant permission to petitioner's aforesaid organization for the use of a school building in
35 Yonkers, New York, at a time and place to be fixed on the settlement of the order.

Dated: New York, N. Y., December 9, 1952.

JAMES R. ELLIS,
Petitioner.

(Verified December 9, 1952.)

Notice of Cross Motion.

(Same Title.)

36

Sir:

PLEASE TAKE NOTICE that upon the notice of motion herein, dated the 9th day of December, 1952 and the petition of James R. Ellis, verified the 9th day of December, 1952, upon which the said notice of motion was based, a motion will be made by respondents at a Special Term, Part I, of the Supreme Court of the State of New York to be held in and for the County of

Westchester at the County Court House in the 37
City of White Plains, N. Y., on the return day of this proceeding, to wit: on the 19th day of December, 1952, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the petition herein as a matter of law upon the following grounds:

1. That the petition is insufficient in law in that it does not state facts sufficient to constitute grounds for the relief sought therein.

2. That the petition fails to show a clear legal 38
right of petitioner to the relief demanded or to any other relief on the merits.

3. That the petition does not state facts to establish that respondents have failed to perform a duty specifically enjoined upon them by law.

4. That the refusal of respondents to grant permission to petitioner's organization for the use of a school building in Yonkers, New York, can be adequately reviewed by an appeal to the Commissioner of Education of the State of New 39
York.

WHEREFORE, respondents respectfully pray that the relief sought by the petitioner herein be denied and that the petition be dismissed with costs.

Dated: Yonkers, N. Y., December 16, 1952.

Yours, etc.,

J. RAYMOND HANNON,
Corporation Counsel,
Attorney for Respondents,
Office & P. O. Address,
City Hall,
Yonkers, N. Y.

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

40

To:

Emanuel Redfield, Esq.,
Attorney for Petitioner,
Office & P. O. Address,
60 Wall Street,
New York 5, N. Y.

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

41 Ellis v. Dixon—This is a proceeding under Article 78 of the Civil Practice Act for an order directing the Board of Education of the City of Yonkers to permit petitioner's organization, the Yonkers Committee for Peace, an unincorporated association, the use of a schoolhouse in the City of Yonkers.

The petition alleges in substance that petitioner, on behalf of his organization, made applications to the respondent Board of Education on
42 two occasions for permission to use an auditorium of one of the schools for the purpose of conducting a forum for the discussion of problems relating to peace and war; and that both of the applications were denied; that respondents did not inform petitioner of the reason for denial of permission; that respondents are concealing a design to discriminate against petitioner and his organization; and that the acts of respondents are arbitrary and unreasonable, and in violation of petitioner's constitutional rights.

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

43

On the return of the petition, before the service of an answer, respondents have moved under section 1293, C. P. A., to dismiss the petition as a matter of law. Respondents urge three grounds for dismissal, namely: (1) That the petitioner has failed to show a clear legal right to the relief demanded, (2) that the petition does not state facts establishing that respondents have failed to perform a duty specifically enjoined upon them by law, and (3) that the determination of the Board of Education can adequately be reviewed by an 44
appeal to the Commissioner of Education.

Without prejudging the merits of the controversy at this stage, a few observations with respect to the extent of the discretionary power of the administrative body may be in order. The law is well established that the acts of a board of education in granting or refusing to grant permission for the use of a schoolhouse, out of school hours, are discretionary (sec. 414, Education Law); and the courts will not interfere with this discretion 45
unless the action of the board is essentially arbitrary. Many factors may be taken into consideration by the administrative body in making its determination. The board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters in the district. Assuming that a proposed use is in itself legitimate, a board of education may still find that the sentiment of the community is divided as to the propriety of the use and may properly refuse

46 a request, the granting of which would result in dissatisfaction and criticism (Matter of Women's Civic Club of Katonah, Inc., 31 State Dept. Rep., 396, 397; Matter of Vernon High School Alumni Association, 15 State Dept. Rep., 476).

In this connection a quotation from Appeal of American Civil Liberties Union (36 State Dept. Rep., 97, 98) is apropos. It was there stated: "Schools are established and maintained for a definite and specific purpose, to wit, the secular
47 education of the youth of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged. On the other hand, any activity which is not embraced in the general school program and which is of a controversial nature liable to arouse ill feeling, jealousy or dissension, or to lead to misunderstanding, should be rigidly debarred. By pursuing this policy in the past our public schools have maintained the confidence and respect of all
48 elements, classes, creeds and factions. The public schools are supported by the whole body of citizens; within their walls assemble the children of the rich and the poor, the children of parents of every shade of religious belief and unbelief. The children of almost every race and color. Therefore, nothing that will tend to foster intolerance, bigotry, animosity or dissension should be allowed to inject itself into the public school system of this great State."

Opinion of Coyne, J., N. Y. Law Journal 1/15/53. Vol. 129, P. 160.

49

The objects and purposes of petitioner's organization, as set forth in the petition, and the proposed subject of the forum discussions, impress this court as being of an essentially controversial nature.

Quite apart from the general principles above stated, the within application must be disposed of on a purely procedural ground. Generally speaking, any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is authorized and required to ex- 50
amine and decide the same (Education Law, section 310). Section 1285, subdivision 4, of the Civil Practice Act, declares that, except as otherwise provided by statute, the procedure under article 78 shall not be available to review a determination where it can be adequately reviewed by an appeal to a court or some other body or officer. Section 310 of the Education Law authorizes an appeal to the commissioner of education in consequence of any action by an official therein named or by any other official act or decision of any offi- 51
cer, school authorities, or meetings concerning any other matter or any other act pertaining to common schools. It is authoritatively stated that the commissioner of education is by the Legislature recognized as having judicial functions. The purpose of the statute was to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same as

52 far as practicable and possible from controversies in the courts (Bullock v. Cooley, 225 N. Y., 566). This sound policy assures consideration and determination by a person peculiarly conversant with school problems.

Where, as here, the denial of permission to use a schoolhouse involved the exercise of a discretionary power by the respondent board of education, it is the opinion of this court that an appeal to the commissioner of education is the ex-
53 clusive remedy of petitioner. In making this determination, the court is not unmindful of the authorities holding that the provisions of section 310 of the Education Law do not preclude redress to the court *in a proper case* (italics supplied for emphasis). In most, if not all, of the situations where the court assumed jurisdiction, the right of the party aggrieved involved the interpretation of a statute, or involved a situation where the administrative officer or body proceeded to act in
54 violation of an express statute. That, of course, is not the situation at bar.

Under all of the circumstances, the court deems it provident to grant respondents' motion to dismiss the petition on the third ground stated; without prejudice to petitioner's right to appeal to the commissioner of education, and without prejudice to his further right to seek a review of the commissioner's determination, if he believes it to be arbitrary (Matter of Levitch v. Board of Education, 243 N. Y., 373; Matter of Fabricius v. Graves,

254 App. Div., 19). In view of the foregoing, no 55
disposition need be made of the remaining grounds for dismissal urged by respondent.

Submit final order accordingly.

Stipulation Waiving Certification.

(Same Title.)

Pursuant to Section 170 of the Civil Practice Act, IT IS HEREBY STIPULATED that the foregoing case on appeal contains true copies of 56
the Notice of Appeal, Order Appealed From, Notice of Motion, Petition, Notice of Cross Motion, Opinion and the whole thereof now on file in the office of the clerk of the County of Westchester and certification thereof by said clerk is hereby waived.

Dated: February ...., 1953.

J. RAYMOND HANNON,
Attorney for Respondents. 57

EMANUEL REDFIELD,
Attorney for Appellant.

Order of Appellate Division Denying Leave to Appeal to Court of Appeals.

58

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 18th day of May, 1953.

Present: Hon. Frank F. Adel,
Acting Presiding Justice.

Henry G. Wenzel, Jr.,
59 John Mac Crate,
Frederick G. Schmidt,
George J. Beldock,
Justices.

———o———

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Appellant,

against

60 WILLIAM DIXON, JR., *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

———

Order on Motion for leave to appeal to the Court of Appeals.

———o———

The above named James R. Ellis, as President of the Yonkers Committee for Peace, etc., the

Order of Appellate Division Denying Leave to Appeal to Court of Appeals.

61

appellant in this proceeding, having made a motion for leave to appeal to the Court of Appeals; and the motion having been duly submitted:

Now on reading and filing the papers in support of and in opposition to said motion; and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

IT IS ORDERED that the said motion be and the same hereby is denied.

62

Enter:

JOHN J. CALLAHAN,
Clerk.

63

Order of Court of Appeals Denying Leave to Appeal.

64

STATE OF NEW YORK

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-second day of October A. D. 1953.

Present: Hon. Edmund H. Lewis,
Chief Judge, Presiding.

65

Mo. No. 339.

In the Matter
of
The Application of JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,
Appellant,

vs.

WILLIAM DIXON, JR., & ors., as members of
66 the Board of Education of the City of Yonkers, &c.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied within ten dollars costs and necessary printing disbursements. 67

A Copy.

GEARON KIMBALL,
(Seal) Deputy Clerk.

Order of Affirmance.

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 20th day of April, 1953. 68

Present: Hon. Gerald Nolan,
Presiding Justice.

" William B. Carswell,
" Henry G. Wenzel, Jr.,
" Frederick G. Schmidt, 69
" George J. Beldock,
Justices.

The above named James R. Ellis, as President of the Yonkers Committee for Peace, an unincorporated association, petitioner in this proceeding having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 28th day of Janu-

70 ary, 1953, denying petitioner's application to compel respondents to grant permission for the use of a school building by an unincorporated association, and granting respondents' cross-motion to dismiss the petition, herein, and the said appeal having been argued by Mr. Emanuel Redfield of Counsel for appellant, and argued by Mr. J. Raymond Hannon, Corporation Counsel, of Counsel for respondents, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore
71 filed:

IT IS ORDERED that the order so appealed from be and the same hereby is unanimously affirmed, with $10. costs and disbursements.

Enter:

JOHN J. CALLAHAN,
Clerk.

Supreme Court of the United States, October Term, 1953

No. 534

James R. Ellis, as President of the Yonkers Committee for Peace, an Unincorporated Association, Petitioner,

vs.

William Dixon, et al., as Members of the Board of Education of the City of Yonkers, etc.

Order Allowing Certiorari—Filed March 15, 1954

The petition herein for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.